MOTION FILED
JUL 18 1985

No. 84-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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MOTION OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The NAACP Legal Defense & Educational Fund, Inc., ("LDF") respectfully moves the Court pursuant to Rule 36.3, Rules of the Supreme Court of the United States, for leave to file the attached brief as amicus

curiae in support of respondent. Respondent has consented, but the State of California has refused its consent.

LDF is a non-profit corporation organized under the laws of the State of New York. It was formed to assist blacks to secure their constitutional rights through the courts. Under its charter, LDF renders legal aid to impoverished blacks suffering injustice by reason of race. For many years, its attorneys have represented parties and appeared as amicus curiae in this Court on a broad range of issues including both the substantive and procedural law relevant to cases of racial discrimination.

This case involves questions regarding appropriate remedies for racial discrimination in the selection of grand juries. Issues of racial discrimination in jury selection have been a long standing concern of LDF; it has represented criminal defendants raising jury discrimi-

nation claims on direct appeal, e.g., Alexander v. Louisiana, 405 U.S. 625 (1972); Swain v. Alabama, 380 U.S. 202 (1965); represented potential black jurors who have been excluded from jury service, e.g., Turner v. Fouche, 396 U.S. 346 (1970); and is participating in this Court as amicus curiae in pending cases raising important issues of jury discrimination. E.g., Batson v. Kentucky, No. 84-6263.

This case presents the important question of the remedy for grand jury discrimination and a complicated issue of habeas corpus jurisprudence. In light of LDF's historic concern with and involvement in jury issues, and in light of LDF's recognized expertise in "the difficult questions of law that frequently arise in" these case, see NAACP v. Button, 371 U.S. 415, 422 (1963), we respecfully submit that its participation will be of assistance to the Court.

For the foregoing reasons, we respectfully request that leave to participate as amicus curiae be granted.

Respectfully submitted,

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STATEMENT OF THE CASE

A. Statement of Facts: Grand Jury Discrimination

The district court found that respondent, Booker T. Hillery, was indicted for murder in 1962 by a Kings County, California, grand jury from which all eligible blacks were excluded in violation of the equal protection clause. Hillery v. Pulley, 563 F.Supp. 1228 (E.D. Cal. 1983).[1]

The basic historical facts were never in dispute. Potential grand jurors were selected by the superior court judge from the list of eligible jurors in the county. Kings County had only one superior court

[1] Mr. Hillery, a black, was also tried and convicted for the murder of a white by a petit jury that was all white. All claims of exclusion of blacks from Mr. Hillery's trial jury were dismissed by the first habeas judge as "conclusionary and unsupported." See n. 12 infra. Thus, the issue was not explicated at the habeas hearing. Nevertheless, it appears that at Mr. Hillery's trial, the prosecution exercised its peremptory challenges to strike all blacks from the venire. Hilley v. Pulley, No. 83-2017 (9th Cir.) Clerk's Record Doc. No. ("C.R.") 5 at 11.

judge. At the time of Mr. Hillery's indictment and trial, this judge was Meredith Wingrove, who had served since 1956. By his own admission, R.T. 102,[2] he never selected a black to serve on a grand jury until 1963, the year after Mr. Hillery's challenge to the composition of the grand jury and trial. That first black grand juror, Ann B. Cole, was -- as both the California Supreme Court, J.A. 48, and the habeas court, 563 F. Supp. at 1232 & n. 8, found -- the first black ever to sit as a grand juror in Kings County since its incorporation in 1893.

While the black population of Kings County was small, there were sufficient eligible blacks to have appeared on grand juries in the absence of discrimination. Although blacks constituted only about 1% of the county prior to World War II, post

[2] Citations to the 1962 state court hearing are designated "R.T." Citations to the record in the Ninth Circuit are designated "C.R." Citations to "J.A." refer to the Joint Appendix in this Court.

war migration brought increasing numbers of blacks. Blacks constituted 3.9% of the county by 1950 and 5.1% by 1960. J.A. 44-45. Blacks served as trial jurors throughout this period even though, as later developed at the habeas hearing, the number of blacks over twenty-one years old, the minimum age for jury duty at that time, was slightly below the overall percentage of blacks in the county: about 3.8% in 1950 and 4.7% in 1960. 563 F.Supp. at 1232; J.A. 61.

In 1962, California law governing eligibility for grand jury service required that the potential juror be "of fair character, approved integrity, and sound judgment." 563 F.Supp at 1231 & n. 3. The records of both the state court and the habeas hearing make clear that in 1962 there were blacks in Kings County who met these criteria. Judge Wingrove mentioned Mr. Lloyd Welcher, who, he had determined, was qualified to serve. Judge

Wingrove nevertheless declined to submit his name for the dubious reason that he was employed.[3] It was also established that blacks had served on petit juries, J.A. 48, the qualifications for which were essentially similar. 563 F.Supp. at 1245.[4]

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[3] As Judge Wingrove put it, "you can't expect to put somebody on the Grand Jury who is going to have to interfere with his employment too much." 563 F.Supp. at 1233; J.A. 50.

The reliance on the fact of employment to disqualify an otherwise eligible black is dubious in light of Judge Wingrove's statements that he looked for potential jurors "of the better type" and his efforts "to get occupations, farmer, businessmen and other various types so it will be real — a real representative group of people, of the better type." R.T. at 38. If Mr. Welcher had been unemployed would not that have suggested to Judge Wingrove that he was not "of the better type?"

It should also be noted that the habeas court found "that grand jury service would have been a hardship but that some blacks, if asked to serve, would have made the sacrifice." 563 F.Supp. at 1234.

[4] Indeed, when Judge Wingrove finally began seriously to consider blacks for grand jury service for 1963, he turned to Bessie Welcher, a black resident of the county, who had previously served on Kings County trial juries in the 50's and early 60's. He did not select Mrs. Welcher in 1963 because she had served as a trial juror in 1962; under the statute, jury service in the immediately preceding year was a disqualification. Deposition of Bessie Welcher at 11-12, C.R. 52. See discussion infra.

At the habeas hearing, Mr. Hillery submitted the testimony of elderly black residents of Kings County and that of Mr. Hillery's original trial counsel, Hugh Goodwin, to corroborate that there were qualified blacks eligible for grand jury service in 1962. The habeas court specifically credited this testimony.[5] Together with the evidence in the state court record, it established that "there were in Kings County in the 1950's blacks

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[5] The habeas court particularly relied on Mr. Goodwin's testimony, 563 F.Supp. at 1233, which it explicitly characterized as "credible." Id. at 1246.

Both in the petition for certiorari, at 16-17, and in its brief on the merits, at 41-42, the state sets forth the the substance of its cross-examination of these elderly black witnesses concerning the qualifications for grand juror in an attempt to suggest to the Court the unreliability of this testimony. But the federal district court that heard this cross-examination, saw these witnesses, and observed their demeanor was in the best position to weigh the reliability of their testimony and the success of the attempted impeachment. Not only did the district court specifically note the credibility of Mr. Goodwin, it also "note[d] that the only thing more disturbing than the State's failure to introduce expert statistical analysis was respondent's counsel's pointless honing of his cross-examination skills on the elderly black citizens of Kings County...." 563 F.Supp. at 1242 n. 16.

eligible for grand jury service, even given the limited literacy and education level that prevailed among the black population at the time...." 563 F.Supp. at 1234, 1232-33, & 1245-46.

Why these eligible blacks surfaced on the county's petit juries but not its grand juries is made clear on the face of the state court record. For Judge Wingrove explained how he chose potential grand jurors. Applying the openly subjective statutory criteria, he looked for "the better type of our citizens," 563 F.Supp. at 1232; R.T. 37, "someone who has some substance, ... someone who, in the Court's opinion, is intellgent...." Id.; R.T. 104. Thus, while Judge Wingrove asserted that he tried to get a "distribution of racial descents ... both sexes ... occupations, farmer, business men and various other types...," id.; R.T. 38, this was qualified by his desire to obtain "a real representative group of people, of

the better type." Id. (emphasis added). As a result, Judge Wingrove openly acknowledged that he

> never had a colored person on the panel not through lack of desire, but purely through lack of ability to find one that the Court feels would make a proper Grand Juror.

563 F.Supp. at 1233; R.T. 38.[6]

These statements are a candid admission of discrimination under the then governing law. "In explaining the fact that no Negroes appeared on this grand jury list, the [judge] said that [he] knew none available who qualified...." Cassel v. Texas, 339 U.S. 282, 287 (1950). Yet, he also failed in his "constitutional duty" to "seek to learn whether there are in fact any qualified to serve...," Hill v. Texas, 316 U.S. 400, 404 (1942), and "to familiarize [himself] fairly with the

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6 Judge Wingrove even touted his racial evenhandedness in classic terms, R.T. 39: "My goodness, ... for three or four years I palled [sic] around with a colored boy and I will certainly be happy to name the gentleman Gene Roberts, his father worked for my father. I have many friends who are colored people." R.T. 40-41.

qualifications of the eligible jurors of the county without regard to race and color." Cassel, 339 U.S. at 289. For, as the district court found,

> given the most generous reading of the judge's description of his efforts to fulfill his duty under Hill, Cassel, and Smith [v. Texas, 311 U.S. 128 (1940)], it did not amount to much.

563 F.Supp. at 1248 n. 28.[7]

Judge Wingrove was far more successful in finding eligible blacks after Mr. Hillery's July 1962 challenge to the composition of the grand jury. In late 1962 or early 1963, Judge Wingrove contacted Mrs. Bessie Welcher concerning service on the 1963 grand jury. Because

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[7] Judge Wingrove made clear his view that, as far as any duty to include blacks on the grand jury, "the law certainly doesn't require such a thing." R.T. 59, 37. Indeed, he expressed his view that the Court's jury discrimination cases applied to the South, not California. R.T. 59-60; see n. 20 infra.

Judge Wingrove asserted that he had obtained some names of eligible blacks from Mr. Hillery's trial counsel, Hugh Goodwin, earlier that year (1962). It was not made clear whether that was for the 1962 or 1963 grand jury. Mr. Goodwin denied any independent recollection of that exchange. R.T. 42-43.

she had been as a trial juror in 1962, she was disqualified by statute from grand jury service in the immediately following year. The judge then asked her to provide the names of three qualified blacks, which she did. This led to the ultimate selection of Ann B. Cole as the first black grand juror ever to sit in Kings County. See C.R. 52, Deposition of Bessie Welcher at 11-12.

Finally, the finding of discrimination was premised on statistical analyses of the historical data. At the request of the federal district court judge, Mr. Hillery produced expert testimony that, even given the low number of eligible blacks in Kings County, the probability that the total absence of blacks on the grand juries between 1900 and 1962 was due to chance was 57 in 100,000 milion. The expert also testified that if only the years of Judge Wingrove's tenure were considered, the probability that no

blacks would have been chosen to serve on the grand jury if only random factors had governed was two-tenths of one percent, or two in a thousand. 563 F.Supp. at 1241; J.A. 67.

Although the habeas corpus court credited the expert's conclusion, 563 F.Supp at 1243, 1245, it did not do so by rote. Rather, because of the state's "baffling" failure to call a statistical expert of its own, 536 F.Supp. at 1242 n. 16, and because of its failure to rebut the statistical showing "through other evidence, cross-examination, or argument...," id. at 1242, the habeas court undertook its own statistical analysis. Limiting itself to the years of Judge Wingrove's tenure,[8] the district court

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8 The expert had looked at the course of grand jury selection in Kings County since the turn of the century. The court, on the other hand, postulated that the selection process over these years might, in reality, be a discontinuous series because of the change in the identity of the selector with the ascension of each new superior court judge. The court employed "a homey illustration...," 563 F.Supp. at 1242, to make its point: the use of repeated statis-

applied the standard deviation analysis used by this Court in Castaneda v. Partida, 430 U.S. 482, 496 n. 17 (1977). It calculated that the difference between the expected number of blacks (9.66) and the actual number (0) was "just over three standard deviations." 563 F.Supp. at 1244 & n. 23. It noted that the figure would be even larger if the entire course of conduct from 1900 onward were considered. Id. at 1245.[9] Thus, the district court,

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tical sampling of a deck of cards in order to ascertain whether the 8 of diamonds has been palmed by the dealer is valid only if there has been one dealer. "If, however, during the course of the game in question, a different dealer was substituted now and again, the probability that the final dealer palmed the card cannot be calculated from the fact that it is probable that there is no 8 of diamonds in the deck." Id. at 1243. Because of the failure of the state to produce any rebuttal statistical analysis, the court could not conclude from the record whether the 1900 to 1962 period was a continuous or discontinuous series. Id. Accordingly, it adopted the more conservative assumption that it was discontinuous.

9 Of course, even the district court acknowledged that the entire period from 1900 should be considered because the continuous series analysis was probably correct. Id. at 1243 & n. 18. Continuing with its 8 of diamonds metaphor, it recognized that, if the deck also changed with each new dealer, and "the experiment is conducted after each new dealer and the probabilities after each such experiment is [sic]

even after exercising caution, finds that standard deviation analysis supports [the expert]'s conclusions and, under the "rule of exclusion," indicates that "racial or other class-related factors entered into the selection process."

563 F.Supp. at 1245 (quoting Castaneda, 430 U.S. at 494 n. 13).

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that there is no 8 of diamonds in the deck, then we have powerful evidence concerning the house's policy on cheating." Id. at 1243 n. 18. Transposing the metaphor to the problem at hand, it is clear that in each year there was a pool of eligible grand jurors containing some blacks -- i.e., a deck containing an 8 of diamonds -- and in each year from 1900 to 1962 no blacks ever surfaced on the grand jury no matter which superior judge --i.e., which dealer -- was sitting. Accordingly, the inference of discrimination is "powerful."

Moreover, the historic record of total absence of blacks from Kings County grand juries is important for one further reason. Amongst the circumstantial evidence to be considered in making the "sensitive inquiry" into discrimination is: "The historical background of the decision ..., particularly if it reveals a series of official actions taken for invidious purpose...."Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 257-59 (1977). Thus, even if the process of selecting grand jurors since the turn of the century is considered a discontinuous series, evidence of prior historical practice would be relevant (to use the district court's metaphor) to "the house's policy on cheating" — i.e., the policy and practice that had historic sanction when Judge Wingrove took over the selection of grand jurors in 1956.

B. Course of Proceedings

In an indictment returned on June 27, 1962, an all white grand jury indicted Mr. Hillery for murder. On July 16, 1962, he filed a motion to quash the indictment on the ground that blacks had been systematically excluded from Kings County grand juries. J.A. 19-20. A hearing was held on July 31, 1962, and the motion was denied the same day.[10]

The hearing was presided over by Judge Wingrove, the only superior court judge sitting in Kings County. All of Judge Wingrove's predecessors were deceased. Because Judge Wingrove had personally selected the grand jury that indicted Mr. Hillery, and the seven preceding grand juries as well, respondent asked Judge Wingrove to testify. The judge declined,

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[10] Judge Wingrove repeatedly obstructed Mr. Goodwin's attempt to prove the historical exclusion of blacks by calling the district attorneys who had practiced before the grand juries, characterizing it as "negative evidence" that would take too long. R.T. 31, 33, 42, 45, 46, 47, 53. He made clear that he would only give the hearing one day. R.T. 55.

R.T. 102, although there were state procedures allowing transfer to another judge that would have enabled him to do so. 563 F.Supp. at 1230-31 n. 1. Accordingly, he was not sworn as a witness nor subject to cross-examination. Judge Wingrove did, however, make several statements on the record; he ordered that these statements be considered his "testimony." R.T. 102.

The state introduced the census figures from 1910 onward. These showed that blacks constituted between .8% and 1.1% of the county population prior to World War II, 3.97% in 1950, and 5.1% in 1960. J.A. 45. Respondent's allegation that blacks had never served on the grand jury was not disputed; it was further supported by the testimony of the county sheriff, who had resided in the county since 1930, and a newspaperman, who had worked on the local paper since 1910. The county clerk testified that blacks had

served on trial juries since she had taken office in 1953. J.A. 32, 39. It was also established that, in the decade prior to Mr. Hillery's indictment, only four felony prosecutions were initiated by indictment, although there had been over 1,000 criminal[11] prosecutions during that period. There had been only one indictment in 1962, Hillery's. J.A. 32-33. In addition to Mr. Hillery, one other of the indicted defendants was black. J.A. 33. Both the prosecutor and the judge indicated that the primary function of the grand jury was to serve as a watchdog agency, supervising the county government. J.A. 33; R.T. 107.

Judge Wingrove made extensive comments on the record concerning both the motion to quash and his role in selecting the grand jury. His comments on the latter issue have been described above. With regard to the motion, he stated that "the

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11 It was not explained whether the 1,000 criminal prosecutions were all felony cases or whether they included misdemeanor cases.

Court resents any accusations of discrimination shown by this Court...," R.T. 65, and that "the Court very stoutly denies and refutes and feels somewhat incensed with the implication that there has been any discrimination...." R.T. 64 (similar statements appear at R.T. 36, 39). On the ultimate issue of discrimination, he asserted: "There certainly never has been, as far as the present Court is concerned ... any systematic exclusion of anybody from the Grand Jury because of any racial descent...," R.T. 39, and that "[a]s far as the present Court is concerned ... there has never been any feeling of discrimination of any kind ... against anyone...." R.T. 60 (similar denials appear at R.T. 40-41, 105).

Respondent was convicted of first degree murder and sentenced to death in November 1962. As set out in the state's brief, the evidence against Mr. Hillery was entirely circumstantial. Both the

conviction and the sentence of death were affirmed on appeal. People v. Hillery, ___ Cal. 2d ___, 34 Cal. Rptr. 853, 386 P. 2d 477 (1963). Rehearing was granted; the court affirmed the conviction, holding that the circumstantial evidence was sufficient to connect respondent to the crime, but reversed the sentence. People v. Hillery, 2 Cal. 2d 692, 44 Cal. Rptr. 30, 401 P.2d 382 (1965). In its second opinion, the California Supreme Court affirmed Judge Wingrove's ruling on the grand jury discrimination issue as amply supported by the record. In assessing that record, the California court emphasized Judge Wingrove's statements, devoting just over half of its summary of the factual record on the issue to those statements. J.A. 49-50. This Court denied certiorari, Hillery v. California, 386 U.S. 938, reh'g denied, 386 U.S. 1000 (1967), three Justices dissenting on the ground that the admission of evidence

concerning a prior conviction, relevant to the issue of sentence, at a non-bifurcated proceeding violated due process.

On remand, respondent was resentenced to death. This sentence was affirmed. 65 Cal.2d 795, 56 Cal.Rptr. 180, 423 P.2d 208 (1967), cert. denied, 389 U.S. 986, reh'g denied, 390 U.S. 913 (1968). Following this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), Mr. Hillery filed an original petion for habeas corpus in the California Supreme Court asking that court to recall its remittitur and judgment to consider whether a death-scrupled juror had improperly been excused for cause at the second penalty trial. The California Supreme Court found a Witherspoon violation and reversed the sentence of death. In re Hillery, 71 Cal.2d 857, 79 Cal.Rptr. 733, 457 P.2d 565 (1969).

A third jury imposed the death sentence. Mr. Hillery once again appeal-

ed, raising claims challenging both the sentence and the original, 1962 conviction. On March 12, 1974, the California Supreme Court affirmed the original conviction but once again reversed the sentence of death. People v. Hillery, 10 Cal.3rd 897, 112 Cal.Rptr. 524, 519 P.2d 572 (1974).

Proceeding pro se, respondent Hillery then filed a petition for a writ of habeas corpus in state court raising the grand jury claim. The state trial court denied the petition on January 30, 1978. J.A. 4. The California Court of Appeal denied the petition on March 8, 1978. J.A. 5. On April 18, 1978, the California Supreme Court also denied the petition. Id.

Still proceeding pro se, Mr. Hillery filed a petition for a writ of habeas corpus in the federal district court for the Northern District of California on May 22, 1978. J.A. 5-6. It was transferred to the Eastern District and assigned to Judge

MacBride. Id. On January 31, 1979, Judge MacBride dismissed some claims[12] but, on the grand jury discrimination claim, found that Mr. Hillery had stated a prima facie case of discrimination, issued an order to show cause why the writ should not issue, and directed the state to file an answer. J.A. 69-76.

In its return to the petition, the state agreed that Mr. Hillery had exhausted his state remedies by raising the issue on direct appeal and in state habeas proceedings. It nevertheless claimed that federal habeas should be precluded because Mr. Hillery had "an opportunity for a full and fair litigation" of the claim and that the state court "record clearly demonstrates that there was no racial discrimi-

12 He dismissed a claim under the fourth amendment on the basis of Stone v. Powell, 428 U.S. 465(1976). The order also dismissed as "conclusionary and unsupported" additional claims challenging "the composition of his juries." J.A. 70 n. 1. See n. 1 supra. These were contained in a second pleading filed on July 26, 1978, that apparently never made its way into the record. See Clerk's Index of Proceeding (Docket Sheet) at 1.

nation in the selection of the grand jury." C.R. 4 at p. 2.

Subsequently, Judge MacBride took senior status and the case was transferred to the Hon. Lawrence K. Karlton. Judge Karlton reviewed the pleadings and the state court record. On March 27, 1980, he denied Mr. Hillery's motion for bail; granted the motion to appoint counsel; vacated Judge MacBride's prior order; and, as provided by Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts, directed the parties to supplement the state court record. C.R. 8. Applying this Court's admonition that a claim of grand jury discrimination requires a "factual inquiry ... that takes into account all possible factors...," Alexander v. Louisiana, 405 U.S. 625, 630 (1972), Judge Karlton concluded that "[t]o accomplish this, it is necessary to supplement and clarify the state court record which is silent or

unclear as to a number of relevant issues." C.R. 8 at p. 2.

Judge Karlton first directed the state to provide "more figures ... demonstrating what portion of the Black population of Kings County was eligible for grand jury service." Id. at 3 (citing Castaneda, 430 U.S. at 488-89 n. 8). Pursuant to Rule 7(b) he also propounded interrogatories "designed to clarify the state court record and the issues in this case...," C.R. 8 at 4, by fleshing out various factual questions not here relevant. Id. at 8.

Judge Karlton observed that the state court record "contains no information as to the results obtainable through the application of statistical analysis to the facts of this case." Id. at 3. Because he understood Castaneda, 430 U.S. at 494 n. 13, and Hernandez v. Texas, 347 U.S. 475, 482 (1954), to "focus[] on the likelihood that chance or accident alone

could account for the exclusion of a group from grand jury service...," C.R. 8 at p. 3, Judge Karlton concluded "that the application of statistical probability analysis may be of substantial assistance...," id. at 3-4, and directed the parties to respond with their views on both the appropriateness of such analysis and how it should be presented.

The state responded with a motion to dismiss premised on two grounds. C.R. 16. First, it invoked Rule 9 and argued that it was prejudiced in its ability to respond to the petition because Judge Wingrove had died in 1966. Second, it argued that this Court's decision in Rose v. Mitchell, 443 U.S. 545 (1979), "precludes supplementation of the state court record...." C.R. 16 at p. 7. This latter argument was premised not on any aspect of the exhaustion requirement, but rather on language in Rose that referred to the habeas petitioners' evidentiary showing,

which had been introduced in the state courts, and concluded: "On the record of this case, it is that testimony alone upon which respondents' allegations of discrimination must stand or fall." 443 U.S. at 570. C.R. 16 at pp. 9-11. From this observation, the state abstracted a general principle that a habeas court "is limited to the record presented to the state trial court under the clear authority of Rose v. Mitchell...." C.R. at p. 11.

Judge Karlton rejected both these arguments. Hillery v. Sumner, 496 F.Supp. 632 (E.D. Cal. 1980). The Rule 9 claim was rejected on alternative procedural grounds, id. at 635-36, and one dispositive substantive ground: Judge Karlton posited the best factual assumption for the state, "[a]ssuming, arguendo that the loss of Judge Wingrove's testimony would be sufficient prejudice to the state to support dismissal." Id. at 637. Reviewing

the "history of petitioner's state proceedings...," id., he concluded that, because of the principle of comity and the then governing Ninth Circuit precedents, the pending state proceedings meant that "at the earliest petitioner could not have filed in federal court until 1967..., and perhaps not even until 1974 when the state litigation was finally resolved." Id. [13] In either case, Judge Wingrove had already passed away before Mr. Hillery's claims were ripe for federal habeas and, thus, "no prejudice from delay suffered by the state is attributable to petitioner [Hillery]." Id. Although, Judge Karlton did not determine whether the loss of

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[13] Judge Karlton reasoned that it was not until 1967, when the California Supreme Court affirmed the second death sentence, that the state proceedings had ended and that all ofMr. Hillery's claims were ripe for presentation on federal habeas corpus. In fact, however, Mr. Hillery successfully reopened the state proceedings by filing an original habeas petition in the California Supreme Court raising a Witherspoon claim. That led to a new sentencing proceeding and a third direct appeal, on which the California Supreme Court rejected additional claims going to the 1962 conviction. Thus, in fact, the case was not ripe for federal habeas until 1974.

Judge Wingrove's live testimony was in fact prejudicial, it would seem clear that the judge's uncross-examined, 1962 comments were as favorable a record for the state as it was likely to have obtained had he lived.

Judge Karlton also rejected the state's contention that the habeas proceeding was limited to the state court record under Rose. He noted that "the single sentence in Rose that the trial judge's affidavit 'formed no part of the case put on by respondents' ... seems a slender reed to base such a startling departure from Rule 7(c), 28 U.S.C. § 2254(d), and Townsend v. Sain[, 372 U.S. 293 (1963)]." Id. Rather, he correctly explained the Rose opinion as concerning "the procedural posture of the case," --i.e., the fact that the Sixth Circuit premised "its finding of a prima facie case" on matters first introduced on

rebuttal in the habeas proceeding. 496 F.Supp. at 638 (emphasis in original).

After the parties responded to the court's interrogatories, the court held a status conference. At that time, the parties agreed: (1) that Mr. Hillery's evidence was sufficient to support an order to show cause why the writ should not issue; (2) that an evidentiary hearing was necessary, in part to enable the state to cross-examine Mr. Hillery's witnesses; and (3) that the state continued to maintain that "evidence outside the record should not be allowed" and preserved "this issue for appeal purposes." C.R. 32 at p. 1.

Despite the stipulation, the state filed a motion to dismiss and, shortly thereafter, a motion to deny Mr. Hillery's request for an evidentiary hearing. It was in these motions that the state first raised an exhaustion question with regard to the "new" evidence. Although Judge

Karlton was "somewhat frustrated" by the state's "notion that it may file a motion to dismiss in a habeas corpus proceeding whenever the spirit moves it to do so...," Hillery v. Pulley, 533 F.Supp. 1189, 1193 & n. 5 (E.D. Cal. 1982), he nevertheless entertained the motion on the merits.[14]

On the exhaustion issue, Judge Karlton started from the premise that "it is clear that the petitioner must have presented to the state court essentially the same claim as that presented to the district court." Id. at 1197. "It is equally clear...," he observed, "that a habeas petitioner is not limited to the record made in state court but that evidence can and, in some cases, must be

[14] Ordinarily, the exhaustion question is raised either in the state's answer under Rule 5 or by way of a motion to dismiss in lieu of an answer after the habeas judge has determined under Rule 4 that summary dismissal is inappropriate. In agreeing to the stipulation, "the state admitted that summary disposition was inappropriate." 533 F.Supp. at 1194. Plainly, the state could have and should have raised the exhaustion issue prior to stipulating that the case could not be dismissed summarily but should instead go to an evidentiary hearing.

taken." Id. Noting that "[n]either the cases, the federal statutes, nor the rules 'strip the district courts of all discretion to exercise their common sense...,'" id. at 1199 n. 19 (quoting Machibroda v. United States, 368 U.S. 487, 495 (1962)), he concluded that "it defies logic to assert that one likely result of granting an evidentiary hearing -- namely that the district court will receive evidence not presented to the state court -- requires dismissal for failure to exhaust." Id. at 1199 (emphasis added).

Judge Karlton identified the three items that the state objected to as "new" evidence: (1) the addition of census data for 1900; (2) the testimony of three witnesses called to establish the eligibility of blacks for grand jury service and other historical facts such as exclusion; and (3) the statistical analysis of the census data. 533 F.Supp. at 1200. On the basis of "[a] calm examination of the

evidence...," id. at 1201, he rejected the state's assertion that this "new" evidence "dramatically changes" the claim.

The first two items, Judge Karlton noted, were at best cumulative. The "new" evidence that blacks had never served on the grand jury did not alter the claim: That historical fact had been accepted by the state courts. The "new" evidence of eligible blacks was similarly cumulative because that fact was established by Judge Wingrove's statement that he declined to appoint an eligible black.

Judge Karlton also rejected the state's argument that the statistical analysis "fundamentally alters" the claim because it is "dispositive." Statistical analysis, he noted, is only one part of "a factual inquiry ... that takes into account all possible explanatory factors." 533 F.Supp. at 1202 (quoting Alexander, 405 U.S. at 630). "More important...," Judge Karlton continued,

> is the fact that respondent's arguments misconstrue the nature of the evidence in question. The testimony... is simply the expert analysis of evidence already before the court.... [S]tatistical analysis of census data is the kind of information designed to make the facts relative to the absence of Blacks in grand juries significant, i.e. to aid the trier of fact in understanding the evidence before the court.

533 F.Supp. at 1202. This conclusion was corroborated, Judge Karlton observed, by this Court's use of statistical analysis in Alexander and Castaneda even though such analysis was not part of the record in the courts below. Id. at 1203.

Judge Karlton found that Hillery's proffered evidence stated a prima facie case under Castaneda and ordered an evidentiary hearing. After the hearing, he found that blacks had been systematically excluded from Kings County grand juries. He rejected the state's argument that grand jury discrimination is harmless error both on the basis of Rose v. Mitchell and because of the need to deter

discrimination and maintain the integrity of the judicial process. 563 F.Supp. at 1252. Accordingly, he issued the writ. Id.

The Ninth Circuit affirmed, one judge dissenting on the exhaustion issue. Hillery v. Pulley, No. 83-2017 (9th Cir. May 14, 1984). In a per curiam opinion, it relied on "the reasons set forth is the excellent and extensive District Court opinion granting the application...," citing each of Judge Karlton's three published opinions. 563 F.Supp 1228; 533 F.Supp. 1189; and 496 F.Supp. 632.

SUMMARY OF ARGUMENT

For over 100 years, the Court has held that racial discrimination in the selection of the indicting grand jury requires reversal of the resulting conviction. This principle is supported by five important considerations. First, the very function of the grand jury is distorted when identifiable groups with distinct experiences and perspectives are

removed from the decision-making process. Second, claims of racial discrimination have a special constitutional force in light of the fundamental concern with racial equality that emerges from this country's history. Third, the taint of racial discrimination impugns the integrity and legitimacy of the administration of criminal justice. Fourth, as a practical matter, the remedy repeatedly affirmed by the Court is the only effective one.

Finally, the notion that a subsequent conviction renders a tainted indictment harmless misconceives the role of the grand jury. A grand jury not only decides whether a criminal case should go forward, it also decides how the prosecutor will proceed by determining the scope and severity of the crime charged. A harmless error analysis is inapplicable because a court cannot reconstruct how a properly constituted grand jury would have charged the defendant.

The version of the exhaustion requirement proposed by the state has no support in the habeas statute, the rules governing habeas proceedings, the precedents of the Court, or any identifiable policy of federalism. Once a habeas petitioner has fairly presented the legal and factual substance of his claim to the state courts, he cannot fairly be penalized for their failure either to afford him a full and fair hearing or to consider his claim in light of the governing constitutional principles. No considerations of federalism or sound judicial administration call for a rule that reduces the role of a federal habeas judge to a rubber stamp of the state process. Rather, the habeas scheme long embedded in statute and case law expects and requires federal judges to conduct an independent, constitutionally sensitive inquiry into allegations of constitutional error. See, e.g., Brown v. Allen, 344 U.S. 443, 507 (1954).

ARGUMENT

I. THE VERY NATURE OF THE CLAIM OF RACIAL DISCRIMINATION IN THE SELECTION OF THE GRAND JURY RENDERS A HARMLESS ERROR ANALYSIS INAPPROPRIATE

The state's case for overruling a century of precedent only rehashes points the Court has long, repeatedly, and recently rejected. See, e.g., Rose v. Mitchell, 443 U.S. 545 (1979).

> It has been settled law since 1880 that the Civil War Amendments barred the States from discriminating because of race in the selection of juries, whether grand or petty. As a result, a conviction cannot stand which is based on an indictment found by a grand jury from which Negroes were kept because of discrimination.... We ought not to reverse a course of decisions of long standing directed against racial discrimination in the administration of justice.

Cassell v. Texas, 339 U.S. 282, 290 (1950)(Frankfurter, J., concurring)(citing Neal v. Delaware, 103 U.S. 370 (1881)). The doctrine of stare decisis carries added weight in the context of the fundamental national norm prohibiting racial discrimination. See Runyon v.

McCrary, 427 U.S. 160, 191 (1976)(Stevens, J., concurring).

Five important considerations sustain the time honored rule that grand jury discrimination fatally undermines the validity of the indictment and the resulting conviction: First, the exclusion of an identifiable segment of the community from the the grand jury undermines its function by

> remov[ing] from the jury room qualities of human nature and varieties of human experience the range of which is unknown and perhaps unknowable.

Peters v. Kiff, 407 U.S. 493, 503 (1972). This range of perspective is as critical when the jury in employed at the charging stage as it is at trial. In noting the constitutional immateriality of the ministerial position of grand jury foremen in Hobby v. United States, 468 U.S. ___, 82 L.Ed.2d 260 (1984), the Court affirmed by necessary implication that the grand jury itself is so significant to the

> administration of justice that discrimination in [its] appointment ... impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment.

Id., 82 L.Ed.2d at 266.[15]

Second, the fundamental norm prohibiting racial discrimination has special constitutional force.

> [T]here can no longer be any doubt that racial discrimination ... violates deeply and widely accepted views of elementary justice.... Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination.

Bob Jones University v. United States, ___ U.S. ___, 76 L.Ed.2d 157, 174 (1983). That racial discrimination in grand jury selection offends this firm national policy has been emphasized both by this Court's decisions, see Rose, and by congressional enactment specifically

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15 See also id. at 267 (no constitutional error "[s]o long as the composition of the grand jury as a whole serves the representational due process value...").

making such discrimination a criminal offense. 18 U.S.C. § 243; see Alexander, 405 U.S. at 629 n. 8.

Third, "the jury plays a political function in the administration of the law...." Taylor v. Louisiana, 419 U.S. 522, 529 (1975). The specter of racial discrimination in the criminal justice system -- particularly where the key actor is the judge himself -- is "not ... consistent with our democratic heritage" nor conducive "to public confidence in the fairness of the criminal justice system." Id. at 530. It

> destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process..., impair[ing] the confidence of the public in the administration of justice.

Rose, 443 U.S. at 555-56.[16]

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[16] Justice Stevens has expressed much the same idea: "A rule that forbids discrimination in the selection of a grand jury must be justified by the overriding interest in maintaining the integrity of the judicial process -- both the actual fairness of that process and the symbolic values that it embodies." Hobby, 82 L.Ed.2d at 277.

The fact that California grand juries only rarely serve the charging function, but ordinarily serve as "watchdog" over county government, reenforces rather than diminishes these concerns. Nothing could be more central to democratic notions than the grand jury's role as overseer of the citizens' elected and appointed officials. The exclusion of blacks from this aspect of self-government is amongst "the primary evil[s] at which the Amendments adopted after the War Between the States ... were aimed." Rose, 443 U.S. at 554.

Moreover, the very rarity with which California prosecutors seek indictment by grand jury rather than proceeding by information underlines the importance of the grand jury's role. When a prosecutor can charge unilaterally, he is likely to seek indictment by grand jury only in those notorious or controversial cases where it is of heightened importance that the legitimacy of the criminal justice

process be supported by the the imprimatur of the community's judgment. But that increases the importance of assuring that no segment of the community is excluded from the grand jury.

Fourth, as the Court noted in Rose, reversal of convictions premised on indictments tainted by racial discrimination is the only effective mechanism for enforcement of these fundamental interests. Both criminal prosecutions and civil actions are rare, and costly. 443 U.S. at 558. An aggrieved defendant is well positioned to vindicate the underlying societal interest in deterring discrimination; the potential loss of otherwise supportable convictions is likely to be a powerful deterrent to the selector who, as here, is often an actor in the criminal justice system. In this very case, Mr. Hillery's motion to quash was the catalyst that ended more than half a century of

total exclusion of blacks from the grand juries in Kings County.

Finally, the harmless error rule is particularly difficult to apply in cases of grand jury discrimination. The argument that conviction beyond a reasonable doubt moots any taint at the charging level misconceives the function of the grand jury process.[17] For the grand jury is more than a simple binary gatekeeper deciding whether a particular defendant enters the criminal justice system. It also performs a discretionary role in shaping the processes to follow by the terms of the indictment it returns. If a grand jury indicts only for a lesser included offense, that is the greatest crime for which the defendant can be convicted regardless of the nature of the proof at

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17 It also misconceives the nature of the constitutional harm. If the constitutional injury is to the "symbolic values" of the criminal justice process, Hobby, 82 L.Ed.2d at 277, and the integrity and public legitimacy of that process, then the subsequent conviction does not undo the harm. The process still stands impugned.

trial. See Stirone v. United States , 361 U.S. 212 (1960)(cited in Miller v. United States, ___ U.S. ___, 85 L.Ed.2d 99, 107 (1985)). Similarly, if it charges a higher offense that includes lesser offenses, that will affect the decision facing the petit jury, increasing the reliability of the later determination of guilt or innocence. See Keeble v. United States, 412 U.S. 205 (1973); Beck v. Alabama, 447 U.S. 625 (1980).

These considerations reach their zenith in the notorious or controversial case. When the prosecutor seeks the imprimatur of the grand jury on the determinations of both whether and how to proceed, he is asking for the community's evaluation of the severity of the offense. Consider for example a recent case of some notoriety concerning allegations that a white shot four blacks youths in a New York subway. Two grand juries heard substantially similar testimony. One

charged the defendant with attempted murder, the other only charged him with gun possession violations. Suppose the difference between the two submissions was not in the quantum of the evidence but in the grand juries: one chosen from a representative cross-section, the other racially skewed. Plainly, the consequences of the actions of these hypothetical grand juries would not be erased by subsequent trial determinations in either case, and no amount of judicial hindsight could parse out those effects.

The facts of this case suggest similar problems. Hillery, a black man, was charged with and convicted of the murder of a young white woman, entirely on the basis of circumstantial evidence. The evidence also suggested an attempted rape. On this evidence, an all white grand jury in an overwhelmingly white county made him stand trial for his life. If there had been some blacks on his grand jury, might

they have considered the circumstantial nature of the evidence and charged only a lesser offense? Attempting a harmless error analysis in this context would place the courts in an inextricable speculative thicket.

II. THE EXHAUSTION DOCTRINE IS FULLY SATISFIED WHEN THE STATE COURTS HAVE CONSIDERED THE SAME QUESTION PRESENTED IN FEDERAL HABEAS

The basic fact of this case speaks starkly from the record and is not challenged by the state on certiorari before this Court. The California superior court judge who selected the grand jury that indicted Mr. Hillery -- and who also presided at his trial and decided the motion challenging the composition of the grand jury -- excluded blacks from service on the jury in violation of the equal protection clause.

The state nevertheless argues that the relief was wrongly granted because not every single piece of evidence supporting

this determination was "exhausted" in the state courts. It first wrongly asserts that exhaustion is a jurisdictional prerequisite. State's Brief at 71; but compare Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 691 (1984)("the exhaustion rule...is not jurisdictional"). Then, admitting the question is "a matter of degrees" that depends "upon the nature of the supplemental evidence...,"State's Brief at 74, it makes several alternative assertions concerning when "new" evidence must be "exhausted." These include: (1) "Where the new factual material 'wholly transforms' the case," id. at 81; (2) where it only "'materially changes' it," id.; (3) where it "puts the case in a markedly different posture," id. at 71-72; or, even, (4) "if the new factual allegations are simply more 'compelling.'" Id. at 81. It concedes that exhaustion is not required only when the "new" evidence

"does not materially affect the nature of petitioner's case...." Id. at 74.

The state's position has no basis in the statute, rules, or decisions of this Court concerning federal habeas corpus. Rather, it is transparently result oriented: Exhaustion would always be required unless the evidence makes no difference at all. This position denigrates the roles of the federal habeas judge and counsel, and diminishes the habeas remedy as Congress and the Court have long envisioned it.

In the sections that follow, we discuss the basic parameters of federal habeas corpus and the exhaustion requirement. From these, we derive a sensible and workable rule governing exhaustion that is consistent with both the system established by Congress and the Court and the considerations of comity and federalism.

A. The Federal Habeas Statute and the Exhaustion Requirement

It is helpful to start with the words of the statute. What must be "exhausted ... in the courts of the State" is "the question presented." 28 U.S.C. § 2254(c). "Question presented" is a term of art that has an established and accepted meaning. For example, under the rules of this Court, "[t]he statement of a question presented will be deemed to comprise every subsidiary question fairly included therein." Rule 21.1(a), Rules of the Supreme Court of the United States.

The essential requirement of §2254(b) & (c) is that the state prisoner provide the state courts with fair notice of each of his federal constitutional claims so that they have "the first opportunity to hear the claim...." Picard v. Connor, 404 U.S. 270, 276 (1971). This "notice and opportunity" requirement means that "the federal claim must be fairly

presented," id. at 275; but it is "the substance of a federal ... claim," id. at 278, that must be presented, not every fillip and curlicue.

> [T]here are instances in which "the ultimate question for disposition..." will be the same despite variations in the legal theory or factual allegations....

Picard, 404 U.S. at 277 (quoting Kemp v. Pate, 359 F.2d 749, 751 (7th Cir. 1966)).[18]

The cases substantiate that the exhaustion requirement is about fair notice and opportunity, not procedural exactitude. Thus, when the petitioner first presents the claim to the state court as a state law violation and later frames it in federal terms, the state courts have not had a fair opportunity to consider the question. Picard, supra;

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18 Of course, the defendant cannot knowingly withhold from the state courts relevant facts. But sandbagging of this type is avoided by the application of the "deliberate bypass" and "inexcusable neglect" standards. Townsend v. Sain, 372 U.S. 293, 317 (1963); Guice v. Fortenberry, 661 F.2d 496, 507 & n. 5 (5th Cir. 1981)(en banc); Thomas v. Zant, 697 F.2d 977, 984-85 (11th Cir. 1983).

Anderson v. Harless, 459 U.S. 4 (1982). Another example is a case in which the defendant claimed in state court that his counsel was ineffective in failing to make a particular objection. In federal habeas, he raised a claim of ineffective assistance premised on the entire course of representation. There, the state court was not fairly apprised of the claim and had no real opportunity to consider it. See Burns v. Estelle, 695 F.2d 847 (5th Cir. 1978).

On the other hand, Sanders v. United States, 373 U.S. 1, 16 (1963), provides a counter illustration. Sanders first challenged his confession as involuntary because of physical coercion. On collateral attack, he claimed psychological coercion as well. The Court held that only one claim was presented. The Sanders illustration -- affirmed for the exhaustion context in Picard, 404 U.S. at 277 --underlines the "fair notice and opportu-

nity" principle. Under the governing precedents, the original claim was one of involuntariness of the confession under the totality of the circumstances. See, e.g., Boulden v. Holman, 394 U.S. 478, 480 (1969). That put the first court on notice to consider and review all the circumstances, including those not specified by the defendant.

A similar example is a case in which a defendant first raised a claim premised on a course of conduct amounting to ineffective assistance of counsel. In his federal habeas petition, he specified different aspects of counsel's performance in support of his claim. There was no failure of exhaustion despite the pleading of "new" facts because the state court had fair notice and an opportunity to consider the claim. See, e.g., Vela v. Estelle, 708 F.2d 954, 957-60 (5th Cir. 1983).

Yet another example is provided by Townsend v. Sain, 372 U.S. 293 (1963). In

state court, the defendant claimed that his confession was involuntary because elicited while he was under the influence of a specified drug. In federal habeas, he sought to adduce that the drug was commonly known as a "truth serum." Certainly, this version of the evidence was, to use the state's term, "more compelling." But the Court did not send the case back to the state courts to exhaust the "new" evidence; it remanded, holding that a federal evidentiary hearing was required. Id.

Thus, the state's purported versions of the exhaustion requirement are not supported by the statute, the cases, or the doctrines of comity and federalism that inform them. What is required is only that the defendant have

> provided the [state] "court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.'"

Picard, 404 U.S. at 277. But this is

precisely what Mr. Hillery did.

The question presented to the state courts was identical to that presented to the habeas court. They were told that blacks had never served on the grand jury, that there was a postwar black population of 3.9 to 5.1%, that there were eligible blacks, and that the selection criteria were subjective. The claim was framed in federal constitutional terms. The state courts could have performed whatever statistical calculations appeared useful to them to assess these facts. They didn't. Judge Karlton decided that, in performing his responsibility as a habeas judge, he would be assisted by statistical analysis and specifically asked for it from both parties. Judge Wingrove, in contrast, saw his role differently: He didn't evaluate Mr. Hillery's evidence of racial discrimination, he tried to explain it away.

Analysis of the "new" evidence demonstrates that the exhaustion requirement was not circumvented. Neither the addition of one earlier set of census figures nor the proof of the historical facts of total exclusion and black eligibilty through different means altered the question presented. Nor did the so-called "sophisticated computer analysis," which was nothing more than a series of multiplications. See 563 F.Supp. at 1242 (petitioner's figures "obtained in a rather direct manner").

Statistical analysis is not "evidence;" it is a way of thinking about or evaluating evidence. Thus, in Alexander, the Court evaluated the raw figures in the record on the basis of a statistical analysis that was first set out in the petitioner's brief on the merits in this Court. 405 U.S. at 630 n. 9. Similarly, in Castaneda, a habeas case, the statistical analysis was first performed by the Court

itself. 430 U.S. at 496 n. 17. Statistical analysis is something the state courts, fairly apprised of the same issue, could have done for themselves if they chose. Their failure cannot be attributed to the habeas petitioner under the rubric of the exhaustion requirement.

B. Neither the Habeas Statute, the Rules, Nor the Decisions of this Court Contemplate that Each Piece of Evidence Would Have First Been Presented to the State Courts

One critical problem with the state's position is that it conflicts with the habeas scheme set up by statute, rules, and decisions of this Court. The converse of the principle that a state prisoner must provide the state courts with fair notice of the claim and an opportunity to consider it is that he is entitled to a full and fair opportunity to litigate that claim. When the state courts do not provide him a full and fair hearing, federal habeas is fully open: The state court findings are not presumed correct,

see 28 U.S.C. §2254(d), and a federal evidentiary hearing is mandatory. Townsend v. Sain.

In that case, it follows that the federal court will hear and consider evidence that was not presented to the state courts. That is what the hearing is for. If material facts were not adequately developed at the state hearing, then the presumption of correctness does not apply, § 2254(d)(3), and Townsend requires a hearing. The same is true if "the fact-finding procedure employed by the State court was not adequate...." Id., subsection (2).

The state trial hearing in this case was not full and fair because the judge who presided was an interested party who expressed on the record his resentment of the allegations. He was a material witness who effectively shielded himself from cross-examination and impeachment.[19] He

[19] Cf. 28 U.S.C. § 455(a) (disqualification of

both obstructed the defendant's attempt to prove his case, see n.10 supra, and misapplied the governing constitutional law.[20] The "findings" of the state supreme court were simply an affirmance of the flawed proceeding in the trial court. Indeed, the state supreme court accepted Judge Wingrove's "testimony" wholesale, even though exculpatory protestations of the discriminator are normally insufficient.[21] Faced with this, Judge Karlton properly undertook to reassess the facts and to hold a habeas hearing.

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federal judge when his or her "impartiality might reasonably be questioned"); id., subsection (b)(1) ("personal knowledge of disputed evidentiary facts").

20 Judge Wingrove expressed his view that the Court's jury discrimination cases "apply mostly to the southern part of the United States where there was established a pattern of white people in the minority" excluding blacks from all aspects of political life, a condition that "has never been true to my personal knowledge in the County of Kings or anywhere in the State of California." R.T. 40, 59-60.

21 Avery v. Georgia, 345 U.S. 559, 561 (1952); Hernandez, 347 U.S. at 481; Castaneda, 430 U.S. at 498 n. 19.

Moreover, Judge Karlton did exactly what the decisions of this Court and the drafters of § 2254(d) and the habeas rules envisioned. When, in 1963, the Committee on Habeas Corpus of the Judicial Conference considered what later became §2254 (d), state representatives proposed that all state court findings be accorded a conclusive presumption of correctness. The committee disagreed because it "would be wholly incompatible with the duty of Federal courts to determine Federal constitutional questions." H.R. Rep. No. 1384, 88th Cong., 2d Sess., 23 (May 6, 1964). The committee reviewed this Court's decisions, id. at 24-25, noting particularly the discussion in Brown v. Allen, 344 U.S. at 463-65, balancing the respect to be accorded state determinations of fact with the discretion of the district court to hold a hearing and develop the facts. Id. On that basis, it proposed what is now § 2254(d) to guide federal

habeas judges in determining when and how they are limited by the facts developed in state proceedings.[22]

The rules adopted by the Court and approved by Congress similarly contemplate that a federal habeas court will hear evidentiary facts not presented to the state courts. Thus, the rules provide for the appointment of counsel, Rule 8(c), the expansion of the record, Rule 7, the granting of discovery, Rule 6, and the holding of a hearing pursuant to the Townsend criteria. Rule 8(a); Adv. Comm. Note to Rule 8(a). The role of counsel --at least when properly performed -- is not just to make legal arguments, but also to develop and present facts that will

22 In considering the question whether material facts never presented to the state courts could nevertheless be presented in federal habeas, the Eleventh Circuit reviewed the legislative history of § 2254(d) and concluded: (1) that Congress essentially "codified" Townsend in adopting its criteria; and (2) that the "reason Congress ... remain[ed] silent on the sandbagging issue is ... the issue had already been decided by Townsend's deliberate bypass/inexcusable neglect criteria." Thomas v. Zant, 697 F.2d at 983-85.

persuade the judge to grant relief. The role of the judge in expanding the record under Rule 7 is to fill in facts missing from the state court record. Indeed, he is empowered to shape the record himself by propounding specific interrogatories. Subsection (b). Similarly, the point of discovery is to obtain new facts not previously known. And the hearing, pursuant to Rule 8 and Townsend, is to develop material facts not in the state court record.[23]

The handling of this case by Judge Karlton exemplifies what a concientious habeas judge is supposed to do under the rules. He reviewed the state court record and found it wanting. He ordered the parties to expand the record, propounding interrogatories designed to fill in the

23 It is noteworthy that the drafters of the rules never intended that exhaustion issues would be determined after discovery or at the time of the hearing; as they saw it, exhaustion was to be assessed on the basis of the claims set out in the petition and the state's return. See discussion in the Adv. Comm. Notes to Rules 4 & 5.

evidentiary gaps. He recognized that statistical analysis was relevant but lacking, and he asked the parties to produce it. He did not accept their showing at face value, but delved into it and performed his own statistical analysis. A construction of the exhaustion requirement that would condemn such fidelity to the "[exacting] duty of the Federal district court on habeas...," Townsend, 372 U.S. at 316, and instead imprison the federal habeas judge within the confines of the inquiries that the state courts saw fit to make, is plainly inconsistent with the habeas scheme.

Moreover, such an unsupported construction of the exhaustion requirement would demean the authority and responsibility that federal judges possess in any proceeding before them. It is their office to act as "the governor of the trial for the purposes of assuring its proper conduct and of determining questions of

law." Quercia v. United States, 289 U.S. 466, 469 (1933). Federal judges are obliged to think for themselves in applying federal law to the facts. Cuyler v. Sullivan, 446 U.S. 335, 34-42 (1980); Wainwright v. Sykes, 433 U.S. 72, 80 (1977). That obligation necessarily comprises within it the power to make such inquiries as he or she feels are needed to evaluate the record. Indeed, even, in a jury trial, a federal judge

> enjoys the prerogative, rising often to the standard of a duty, of eliciting those facts he deems necessary to a clear presentation of the issues.

United States v. Brandt, 196 F.2d 653, 655 (2d Cir. 1952).

C. No Policy of Comity or Federalism Requires the Repeated Return to the State Courts to Exhaust Specific Items of Evidence Relating to Claims Already Fairly Presented to Those Courts

"There is, of course, no requirement that petitioner file repetitious applications to state courts." Humphrey v. Cady, 405 U.S. 504, 516 n. 18 (1972). Once a

claim has fairly been presented to the state courts, requiring continued exhaustion for additional evidentiary items provides very little in the way of additional benefits. When, as here, the state courts have defaulted on their responsibililty properly to apply federal law, no reasonable benefit accrues by requiring a return visit with yet another fact supporting the original claim. Cf. Roberts v. LaVallee, 389 U.S. 40 (1967).

Indeed, to require exhaustion under these circumstances would subvert the intent behind § 2254(d). The purpose of that section was "to be a strong inducement to the States ... to provide adequate postconviction remedies and procedures...." S. Rep. No. 1791, 89th Cong., 2d Sess. (Oct. 18, 1966), 1966 U.S. Code Cong. & Ad. News 3663, 3672. That purpose is furthered by according a presumption of correctness to state court findings rendered under procedures that are "full,

fair, and adequate...." § 2254 (d)(6). But it is not furthered when states with inadequate procedures are afforded additional bites at the apple whenever the more adequate federal remedy turns up new evidence.

A new fact might justify return to state court on the same question presented when, through no fault of the state processes, a material, noncumulative fact is later discovered. This is not that case. But even in such a case, the costs of requiring a second visit to the state courts appear to outweigh any conceivable benefit. For there are real costs not only to the defendant but also to the judicial system. Judicial energy already expended in the federal district court is squandered. Final determination of the constitutional issue is put off; the finality of the original state court judgment is postponed yet further.

Requiring repeated exhaustion of this sort threatens the very "celebrated procedural tangles," Hart & Wechsler's THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1490 (2d ed. 1973), that occurred at the time of Ex parte Hawk, 321 U.S. 114 (1944). Because of the exhaustion requirement, it was not until 1952 that a federal court heard and granted Hawk's petition for the writ on his 1936 conviction. Hawk v. Hann, 103 F.Supp. 138 (D.Neb. 1952). Mr. Hillery has spent over 12 years in the state courts and 7 more in the federal courts. To require him to return to the state courts so that they can perform statistical analyses of the same evidence that was before them 23 years ago makes no sense.

This underscores the value of a prompt, full and fair determination of constitutional claims by the state courts in the first instance. But that was lacking here. The purpose of federal habeas is to provide a remedy in just this

circumstance. The imposition of additional exhaustion requirements would only subvert that remedy.

CONCLUSION

For the foregoing reasons, amicus respectfully submits that the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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